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MICHAEL RODAK, J

No. 73-1456

IN THE SUPREME COURT OF THE UNITED STATES

January Term, 1974

THERANCE L. PRIDE and NADINE J. PRIDE, *Petitioners, Plaintiffs and Appellants,*

vs.

UNITED STATES OF AMERICA, et al., *Defendants and Appellees.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Appellant.

Signature — James T. Sloan

Type or Print Name — James Thomas Sloan, Jr.

Address — 501 ISB Building

City and State — Kalamazoo, Michigan 49006

The Clerk is requested to notify counsel of action of the Court by means of: (Regular Mail).

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INTRODUCTORY PARAGRAPH

The petitioners, Terrance L. Pride and Nadine J. Pride, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on December 10, 1973.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript of the Court, including the Judge's Statement on Defendants' Motion for Summary Judgment, are reproduced in Appendix B to this petition.

The opinion of the Court of Appeals will not be reported. The opinion of the Court of Appeals affirming the District Court, is reproduced in Appendix B to this petition.

JURISDICTION

The Judgment of the Court of Appeals (Appendix B) was entered on December 10, 1973. Plaintiffs-Appellants were pursuing their cause of action under 28 U.S.C. Section 1346 (b) and 28 U.S.C. 2674. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, within the meaning, scope, and intent of Section 1346 (b), Title 28 of the United States Code, and Section 2674, Title 28 of the United States Code; may an employee who is injured while working with an inherently dangerous instrumentality maintain a cause of action against the United States, which had contractual directional control over the work.

2. Whether, within the meaning, scope, and intent of Section 1346 (b), Title 28 of the United States Code, and Section 2674, Title 28 of the United States Code; does state law control, thus making the prime employer who has or assumes the duty of inspection liable to an injured employee who had relied upon such inspection and assurances of safety.

3. Whether, within the meaning, scope, and intent of Section 1346 (b), Title 28 of the United States Code, and Section 2674, Title 28 of the United States Code; the phrase ". . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," allows for the subsequent rulings of some United States Federal Courts that have ignored this legislative mandate, and have created Federal Common Law.

4. Whether, within the meaning, scope, and intent of Section 2671, Title 28 of the United States Code; was the Cobb Dredging Company an employee or independent contractor in its relationship with the United States.

STATUTORY PROVISIONS INVOLVED

Section 1346 (b) of the Judicial Code, 28 U.S.C. 1346 (b) provides in pertinent part as follows:

> United States as defendant . . . subject to the provisions of chapter 171 of this title [2671-2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to

the claimant in accordance with the law of the place where the act or omission occurred.

Sections 2671 and 2674 of the Federal Tort Claims Act, 28 U.S.C. 2671 and 28 U.S.C. 2674 provide in pertinent part as follows:

Section 2671. Definitions. — As used in this chapter [2671-2680 of this title] and sections 1346 (b) and 2401 (b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty.

2674. Liability of United States. — The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

CONCISE STATEMENT OF THE CASE

The Appellant was an employee of a prime contractor who had entered into a contract with the United States of America for the improvement of the navigable channel at Bolles Harbor, Michigan, doing this in cooperation with the State of Michigan to improve small boating in the area.

Part of the work involved the use of converted fuel-oil storage tanks to float a line from the operating dredge. Appellant was ordered to test the tanks for airtight integrity. Upon testing of the first tank pneumatically, the tank ruptured violently and caused Appellant extreme personal injuries.

The accident occurred on the 22nd day of April, 1968, at the said Bolles Harbor, Michigan. On October 8, 1969, complainant filed a civil action against the United States, et al., (Appendix C) which was answered by the Defendants on February 9, 1970 (Appendix C).

Subsequent to this date, much discovery was done by the parties, and a pre-trial was held on September 27, 1971. Subsequent to the pre-trial, the United States on November 10, 1971, filed a Motion for Summary Judgment and said Motion was granted on December 20, 1971 (Appendix B). It is this order granting a summary judgment against Appellant, Terrance Pride, that is herein being appealed.

The Honorable Phillip Pratt, United States District Judge, held that the United States was an employer of an independent contractor; and was thus not liable for injury to the employee of said independent contractor. The Court ruled that the alleged facts and circumstances did not give rise to an exception of the aforementioned general rule.

The Court ruled that Appellants could not utilize the "inherently dangerous instrumentality" exception to the aforementioned rule. The Court stated that the United States Supreme Court had stated in *Dalehite* v. *United States*, 346 U.S. 15, (1953); that the Federal Tort Claims Act did not include claims of absolute liability.

The Court held that whereas the United States did determine the amount of work done, whether such work was done in accordance with the contract and whether safety

standards were maintained; that such evidence did not mean that the government had control of the work project. The Court relied on *Gowdy* v. *United States*, 412 F2d 525, (6th Cir. 1969), and *Roberson* v. *United States*, 382 F2d 764, (9th Cir. 1967).

The Court recognized that Michigan has adopted the "Good Samaritan" assumption of duty test as to overseers who inspect on-the-job safety. But after discounting Michigan's strongest case, the Court found no such assumption in the instant case, again relying on *Gowdy*, supra, and *Roberson*, supra.

Appellant appeal this decision to the United States Court of Appeals for the Sixth Circuit. After brief argument by Counsel, the Circuit Court rather summarily affirmed the decision of the District Court on December 10, 1973.

REASONS FOR GRANTING THE WRIT

The decision of the United States District Court and the Sixth Circuit is contrary to the law of the State of Michigan and through judicial amendment renders ineffectual an important section of the Federal Tort Claims Act.

The Tort Claims Act clearly states that the United States shall be liable for the negligence of its employees:

> . . . in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. 2674.

The lower Courts ruled that *Dalehite* v. *United States*, 346 U.S. 15, (1953) stood for the proposition that the Tort Claims Act did not encompass a cause of action holding the government strictly liable.

However, the Courts overlooked the Michigan cases, that specifically hold that the "inherently dangerous instrumentality" doctrine is a mere extention of negligence, and not a doctrine of absolute liability. See *McDonough* v. *General Motors*, 388 Mich 430, 1972), and *Vannoy* v. *City of Warren*, 15 McA 158, (1968).

Appellants also respectfully submit that *Dalehite*, supra, was effectively overruled by *Indian Towing Co.* v. *United States*, 350 U.S. 61, (1955); See, *Rayonier* v. *United States*, 352 U.S. 315, (1957).

Appellants would also respectfully submit that the Federal Circuit Courts and Federal District Courts are in conflict on this particular issue; and therefore this issue is ripe.

See, *Properties* v. *Aerojet General*,
331 F. Supp 1006, (1971)

Benson v. *United States*,
150 F. Supp 612, (1957)

United States v. *Pierce*,
235 F2d 466 (1956),
142 F. Supp 721 (1955)

Indian Towing, supra, also supports Appellants' position that the United States undertook and assumed responsibility for Appellants' safety. At page 64 the Court stated:

> . . . but the statutory language is 'under like circumstances,' and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner.

Appellants submit that the cases of *Gowdy*, supra, and *Roberson*, supra, relied on by the lower Federal Courts are contra to *Indian Towing*, supra. Also, the cases of *Fair* v. *United States*, 234 F2d 288, (5th Cir. 1956), *Haginikitos* v. *United States*, 412 F2d 219, (3rd Cir. 1969), and *Somlo* v. *United States*, 274 F. Supp 827, (1967); show a considerable amount of disagreement over this vital issue raised by the Tort Claims Act.

Appellant submits that the lower Federal Courts also should have been controlled by Michigan State law on this issue. In *Ray* v. *Transamerica*, 10 McA 55, (1968), and the even more illuminating opinion in *Ray* v. *Transamerica*, 46 McA 647, (1973); (issued before the decision of the Circuit Court); Michigan has made it clear that one who volun-

tarily and actively undertakes to assist an employer in carrying out his obligation to provide a safe place to work, will be held to a standard of due care as to that assistance. The lower Courts have read in Federal common law saying that one must take over such responsibility. Michigan law, the only law that should be applied to this issue, states that one need only assist in this area.

The lower Courts also held that the United States did not engage in conduct amounting to control of the operation. Appellant asserts that again the Court has neglected to apply local law. The Court did recognize and Defendant admitted supervision in fact over the project. Michigan law states that supervision in fact exercised is equivalent to supervision expressly retained by the principal contractor. See *Bittker* v. *Groves,* 291 Mich 40, (1939). Also, in Michigan, imputed negligence is equivalent to an affirmative act. See *McDonough,* supra.

This missapplication of the dictates of the Federal Tort Claims Act, the rulings of the Supreme Court and the particular law of the locale is reflected in many conflicting cases among the Circuits. This is a recurring question of law that only the Supreme Court can finally resolve. Certiorari should be granted for the purpose of clarifying this extremely important area of Federal Law.

CONCLUSION

The present case is illustrative of persistent and serious misapplication of the Federal Tort Claims Act by some of the lower Federal Courts. For the reasons previously stated in this petition, Appellants pray for a grant of writ of certiorari.

APPENDIX A

Here are set forth, successively, Constitutional and Statutory Provisions Involved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1346 (b) of the Judicial Code, 28 U.S.C. 1346 (b) provides in pertinent part as follows:

> United States as defendant . . . subject to the provisions of chapter 171 of this title [2671-2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Sections 2671 and 2674 of the Federal Tort Claims Act, 28 U.S.C. 2671 and 28 U.S.C. 2674 provide in pertinent part as follows:

> Section 2671. Definitions. — As used in this chapter [2671-2680 of this title] and sections 1346 (b) and 2401 (b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporraily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty.

2674. Liability of United States. — The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

APPENDIX B

Here are set forth, successively, the opinion of the United States District Court for the Eastern District of Michigan and the Circuit Court of Appeals for the Sixth Circuit.

EXCERPTS FROM TRANSCRIPT OF RULING ON MOTION FOR SUMMARY JUDGMENT

Proceedings had before the Honorable Philip Pratt, United States District Judge, at Detroit, Michigan, December 20, 1971.

THE COURT: This matter comes before the Court on the motion for summary judgment filed by the defendant

United States of America, under Rule 56, which reads as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Under attack is Count 5 of the complaint, which seeks to impose a liability on the United States, more particularly — if I said Count 5, I meant Count 4 ,excuse me, gentlemen — more particularly under paragraphs 4 and 5, which read as follows:

> "4. That defendant, United States of America, through the Department of the Army, Detroit District Corps of Engineers, was in complete control of the (31) aforesaid dredging operation and/or assumed the duty of preventing Cobb Dredging Company carrying on the inherently dangerous activity described herein.
>
> "5. That defendant, United States of America, Department of the Army, Detroit District Corps of Engineers, had the duty and/or assumed the duty of inspecting and preventing an inherently dangerous activity as described herein from continuing to the damage of the plaintiff, Terrance L. Pride, and carelessly and negligently actively failed to prevent the continuance of such inherently dangerous activity known and ought to have been known by said defendant, who therefore actively failed to furnish the plaintiff with a safe place to work."

The balance of the Count alleges that that failure was a proximate cause of the injury to the plaintiff.

The plaintiff's complaint then really goes to the single issue of inherently dangerous activity under the exception to the general rule that an owner is not liable for the negligent acts of an independent contractor. This exception

imposes absolute liability on the owner when the work contracted to be done is inherently or intrinsically hazardous.

However, the motion for summary judgment and response filed, treat the complaint as presenting two bases for the alleged liability:

1: A question of absolute liability because of the inherently dangerous work; and,

2: Ordinary liability — which is based on two theories:

A: That complete control was exercised by the United States, which in effect means that the United States became the employer; and

B: The United States had the duty or assumed the duty to inspect and, therefore, to warn.

Both issues have been argued by counsel. And since they have been, the Court will direct its attention and its determination as to all of the issues presented.

The first issue, of course, is whether there is any dispute as to any material fact.

Plaintiff's brief responds to that in this fashion — reading from page 3 of the plaintiff's brief:

> "Plaintiff's submit that under the applicable Michigan law, and the pleadings in this case, coupled with the United States' own version of the facts in this matter, that there are genuine and material issues of fact with regard to these questions, and (33) that the motion of the United States for summary judgment must be denied."

It will have been noted that the complaint does not allege facts as such. And I don't mean that the pleadings, the complaint does not conform to the requirement of noticed pleadings. However, the situation here is that the complaint is attacked by factual matters contained in the exhibits and depositions submitted to the Court.

My understanding is that the plaintiff does not dispute the facts but really disputes the interpretation that the Government places on those facts. And no other material

has been presented to me other than the depositions already on file and the exhibits which were actually a part of the depositions. So that we do have an instance here where the facts are not disputed but merely the interpretation of the facts.

I might add the attitude of the Sixth Circuit in matters of this nature. In Harrison against Bloomfield Building Industries, Incorporated, 435 F2d 1192, the Sixth Circuit said:

> "We recognize that in ruling on a motion for summary judgment the pleadings and affidavits are to be construed most favorably towards the party opposing (34) the motion" — citing a case — "but the party resisting the motion may not rest on the allegations or denials of his pleadings. Rather, he must set forth specific facts showing a genuine issue for trial" — citing a case. "This Bloomfield failed to do. The pleadings and affidavits convince us that the only defenses intended to be asserted in this case, fraud and violations of the securities acts, are based on the conduct of Kesler acting as agent and partner of Harrison and Johnston. The Utah judgment precludes Bloomfield from relying on that conduct as a defense to Harrison and Johnston's recovery on the note, and summary judgment was properly granted in their favor."

And I cite that case merely to indicate that the Sixth Circuit does appreciate that summary judgment can be based on more than pleadings alone when facts are undisputed.

We begin the legal discussion here with the general statement that — or a statement, rather, of general law that an employer of an independent contractor is not liable for injuries to the employees of the independent contractor. To this general rule there have been forged many exceptions, but three of them are important to our inquiry here. Those exceptions may be stated briefly as being:

1. Where the work is inherently dangerous.
2. Where the prime employer — if I can use that term — controls the work.

3. Where the prime employer has or assumes the duty of inspection and is required to warn.

I don't think that there is any question but that those exceptions and the general rule are accepted in Michigan and probably accepted in most, if not all, of the states.

With regard to the first issue which involves liability due to inherently hazardous or intrinsically dangerous work.

On the basis of that theory, or in considering that theory, the United States Supreme Court has spoken quite clearly in the case of Dalehite against United States, cited at 346 U.S. 15, and more specifically at page 45, and I read as follows — in considering the Tort Claims Act, the Court said:

> "Petitioners rely on the work "wrongful" though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the 936) legislative history of the word indicated clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: 'Trespasses' which might not be considered strictly negligent. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see, for example, the Suits in Admiralty Act" — giving the citation — "in regard to maintenance and cure."

Further, in the case of United States against Taylor, cited at 236 F2d 649, at page 653, a Sixth Circuit case, the Court in the Sixth Circuit said:

> "Assuming that a private individual in the government's position would be absolutely liable to the appellees under this statutory and case law of Tennessee, it does not follow that the United States is there

liable under the provisions of the Federal Tort Claims Act. The explicit terms of 28 U.S.C.A. Section 1346 (b) limit the waiver of sovereign immunity to cases where the damages which have been sustained were 'caused by the negligent or wrongful act or omission of any employee of the government while acting (37) within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'

"This statutory language makes clear that the United States has consented to be sued only where a private person would be liable under the respondeat superior doctrine. Reference must be had to the law of the state for the applicable law as to liability under that doctrine, but state law imposing liability regardless of whether the agent or servant was acting within the scope of his employment, or absolute liability under any circumstances, is inapplicable and irrelevant. The statute itself leaves little room for question on this issue, and any doubt that may have remained has been dispelled by decisions of the courts" — citing Dalehite and other cases.

So, here, regardless of what label may be placed upon it, the stated grounds of the plaintiff here on absolute liability due to inherently dangerous work has already been determined by the court — although perhaps not necessarily under those cases.

In view of the tack taken that under (38) the Michigan case would draw some distinction between absolute liability and accountability where inherently dangerous work is involved, it is difficult for this Court to come to a determination that the work here was inherently dangerous.

We must understand, of course, that the contract provided for dredging work apparently as a part of the work that was to be done. The contractor was to use fuel tanks to float certain materials out to the dredging site. And in the course of using those tanks, it was decided that they

should be tested to determine whether they were airtight.

As I say, in the first instance, I don't see that dredging is necessarily hazardous work, nor do I find that testing of barrels or tanks is inherently dangerous. It certainly may be potentially dangerous, depending on the method used. Unfortunately for the plaintiff here, the method that he was directed to use was a potentially dangerous one, and as a result, he was injured.

But the use of any tool for the purpose of doing a certain piece of work can perhaps be characterized as potentially dangerous in any instance. Even the simplest tool, in other words, can be potentially dangerous if used for the wrong job. A tableknife may not be dangerous in and of itself; but if it is used, for example, to take ice cream (39) that is frozen out of a can, then it could well break or slip or do something that could result in an injury. So, here, the tool itself was not potentially dangerous.

The item to be tested certainly was not, nor was the testing in itself potentially dangerous. But the combination of the two if used improperly, could be potentially dangerous.

But that does not satisfy the requirement of the inherently or potentially, intrinsically dangerous hazardous work presented by the case law.

The next issue present is whether ordinary liability exists here on a duty arising from alleged complete control.

The facts that are determinable from the depositions and interrogatories and the pleadings show that the United States entered into a contract with the defendant Cobb Dredging Company for dredging at or near Bolles Harbor, Michigan. Plaintiff was employed by the Cobb Dredging Company, and was working on this day in question.

In accordance with the contract, the government inspectors — led by one Mr. Norville — conducted routine inspections. But as indicated by the depositions, the inspections were conducted only on the days when there were actual dredging operations.

The inspectors had various duties, in the determination of amount of work done — that is, the quantity — the determination of whether the work was done in accordance with the contract. And in addition, the inspectors also

observed safety violations and reported them either to the contractor or to their superior, in the event of some of the subordinate inspectors.

My review of the depositions and exhibits constrains me to hold that nowhere is it indicated that the inspectors or anyone else connected with the defendant United States engaged in conduct that could be associated with control of the operation. No indicia of control were made apparent to the Court. Nothing, for example, such as instructions on methods or the use of equipment or what equipment to use, directions as to how the work was to be done, the supervision of any employees. Nothing, in short, beyond a comparison by the inspectors between the actual work being done and the requisites of the contract.

The case of Gowdy against United States, reported in 412 F2d 525, gives us some guidelines with respect to that matter, and also indicates what occurs when there is lack in this element of control. There, the Sixth Circuit said:

> "The Government was not required to exercise any (41) supervision or control over its independent contractor and is not liable for failure to do so. The mere reservation of the right to inspect the work did not impose upon the Government any duty of inspection or control. Grogan v. United States, 341 F2d 39, 43. Nor is the Government liable for the negligence of the independent contractor as the Act limits liability to injuries 'caused by the negligence or wrongful act or omission of any employee of the Government'" — again citing Grogan against the United States.
>
> "The Government furnished no equipment to the contractor. It did permit the contractor to use a davit for the purpose of hoisting machinery. The davit was fastened on the edge of the flat roof of the machinery house and extended to a height of about ten to twelve feet above it. There was no proof that the davit was defective or that the davit had anything to do with causing the plaintiff to lose his balance and fall from the roof.
>
> "There was no proof that the Government gave am-

biguous or any other kind of orders or instructions to the contractor."

Reading from Page 531:

"It was not the function of the Government to instruct (42) the contractor's employee, Gowdy, how to use the ratchet hoist. Nor did the Government incur liability by not having personnel present during the course of construction to make sure that the contractor's employees were properly using the contractor's equipment."

The case, in all, is a very thorough examination of this question of negligence, and particularly, as I say, provided us with some standards to be used.

I think it important to note that in the Gowdy case, the Sixth Circuit emphasized that Gowdy, the plaintiff, received no orders or instructions from any Government employee with regard to the use of any equipment. And perhaps a single employee examination might not be controlling under all circumstances, I think that the Gowdy case has in that area, particularly, some significant analogical comparison.

All in all, then, I cannot see how the Government could be held on that basis of liabilities that it had control over the project itself.

The next issue is whether the Government had a duty of inspection and preventing any dangerous activity or condition. And in this area, I suppose there is some correlation with regard to the "Mashony" case, was it? Do I pronounce that correctly? Involving the municipality, at any (43) rate, that has been cited here previously.

I do not find in this instance that the Government had any contractual or statutory duty to inspect and warn. Although it did reserve the right under the contract to inspect, that in and of itself does not create a duty toward an employee of an independent contractor.

And certainly the most important case in this area is the case of Roberson against the United States, cited in 382

F2d 714. There the Court, citing from Kirk against the United States, the Court said:

> "The fact that the United States retained the right to inspect the work under construction to see that the provisions of the contract were carried out and also retained the right to stop work if they were not is not sufficient in itself to make the United States liable for damage resulting from negligence of the contractors in their performance of the contract.'
>
> "We conclude that the Government did not undertake to render safety services to Roberson and Rodgers, and that the branch of the Good Samaritan doctrine based upon such a direct two-person rendition of services therefore has no application here."

And going further, the Court said:

> "As in the case of the two-person facet of the Good Samaritan doctrine, discussed above, the first essential element in establishing liability under the third-person branch of the doctrine is here missing. In conducting its safety inspection program, the Government was not undertaking to render services to the contractor. It sought only to protect its own interest, namely to assure itself that the contractor was performing in the manner required of it under the contract. The safety inspection activities of the Government did not relieve the contractor of any of its contractual duties; quite to the contrary, it was designed only to make sure that the contractor performed those duties."

At page 722, the Court said:

> "It is true that inspection activities may, under some circumstances, give rise to liability under this aspect of the Good Samaritan doctrine."

And then it goes further:

> "It should be made clear that we do not ground our ruling that the Government did not undertake to ren-

der an inspection service to the contractor on the fact that the Government received no compensation for carrying on its safety inspection program. If the (45) actor undertakes to render services for another it is immaterial whether he does so for a consideration or gratuitously. All we hold is that, under the circumstances of this case, the Government's safety inspection activities at Glen Canyon Dam did not represent performance of an undertaking, gratuitously or for consideration, to render services to the contractor."

That case also has some interest to us because it again provides some tests or guidelines as to the amount of work necessary; which gets us, of course, into the area of assumption of duty, which is the particular area here that should be expanded upon. In other words, did the Government, by its conduct, assume the duty gratuitously to inspect and therefore to warn?

This determination as to whether a duty exists or can be imposed upon a party is usually a matter of law to be made by the Court. I say, "usually," advisedly, because my experience leads me to believe that there frequently is some confusion as to the role that a court plays in determining whether a duty exists. Sometimes there is confusion because some courts will say, "the question of fact," perhaps meaning that it is a question of fact for a court to determine as to legal liability or a legal duty, and sometimes a phrase used is, "a question of fact for a jury," and the (46) two, I think, are entirely different phrases even though used sometimes interchangably ordinarily in using them. Usually, however, the question of whether a duty exists, the court must consider even though it may require some factual inquiry.

But be that as it may, without getting into legalistics, as the plaintiff has indicated, the cases which have been cited in this field usually go to the appellate courts only after there has been a determination of the facts after at least a portion of the trial if not the complete trial. And it is true, of course, that the appellate determination is then whether the facts as elicited at the trial can as a matter of law be considered to have created or imposed a duty on

the employer or owner — or the reverse, as the case may be.

Here, of course, we have not had a trial as such. But as I have indicated earlier, where the facts are undisputed, where there is no indication that other facts will be presented and it is only the interpretation of the facts that creates any dispute, then we have in effect had a trial as to the facts necessary for the Court to make a determination as to whether the Government here had a duty.

And here, then, the Court must make the determination whether under these facts, and there being no other facts, the United States assumed the duty to inspect (47) and therefore to warn.

In this respect, the plaintiffs here rely very heavily on the case of Ray against Transamerica Insurance Company, cited in 10 Michigan Appeals 55. But I think that reliance on that case is misplaced. The Ray case did not have before it the specific issue of whether under the facts and circumstances of that case there was created a duty to inspect on the compensation carrier. It acknowledged that there was a theory which is in effect the "Good Samaritan" theory which is tenable and that Michigan recognizes that theory. The decision in that case really went only to the issue of whether there was immunity on the part of the compensation carrier because of the Workman's Compensation Act.

The Ruth case, which followed subsequently, also involved a compensation carrier where in fact there was a finding that the compensation carrier did have the duty to inspect, had assumed the duty to inspect and therefore to warn.

But I think the case is easily distinguished because of first, the actual inspection that occurred with regard to the press in question; secondly, because of the contractual relationship and the provisions of the contract; and, thirdly, of course, because of the direct (48) economic interest of the compensation carrier.

But, at any rate, the question certainly is, as I have indicated before, whether under the facts and circumstances of a particular case, it can be said that the employer of the contractor or the owner assumed the duty.

My review of the depositions and other exhibits and pleadings in this case, again, does not permit me to entertain the opinion that there was an assumption of duty to inspect.

As I mentioned earlier, the inspectors did in fact episodically make observations with regard to safety conditions. And on a number of occasions, they pointed out to the contractor and to their superiors the failure of the contractor to provide safe equipment and failure to provide any equipment in some instances, and these ranged from the failure of men to wear safety jackets when they were on board ship, on board the dredge, to carrying gasoline in non-fireproof containers, and to inoperative signal whistles and the like.

But without reviewing each of those specific matters, and in considering the guidelines that I have already mentioned that have been given to us by the Gowdy and Roberson cases, I cannot find that such conduct over a period of time went beyond the right of privilege to inspect as to (49) safety conditions, nor can I find that over a period of time there gradually developed an assumption of duty on the part of the Government to inspect.

The evidence indicates very clearly that the Government inspectors were not even on the premises at all times. And on those days where there may have been preparation for work for the dredging, they were not present. They were not present at the time that this unfortunate incident occurred, and did not appear until thereafter.

The fact that they might have warned had they been there or would have warned had they been there, does not in my mind create a duty.

All in all, then, considering the facts and circumstances of this case, and the application of the pertinent law, the Court will grant the motion of the United States for summary judgment.

I take it that will make the State of Michigan's motion moot.

MR. CARRIER: That's correct.

MR. POTTER: Your Honor, the United States is asserting indemnity against the State of Michigan. The question is not entirely moot, because there is the question of

expenses and attorney's fees. However, I would beg the Court's indulgence on that question, if we could (50) hold it in abeyance until such time as I consult with my superiors. I think it is conceivable that we would not press the issue of indemnity for attorney's fees in this particular situation.

THE COURT: Very well, Counsel.

MR. GERGELY: May it please the Court, I assume that this may not be the time to bring the matter up. However, it behooves me to indicate to the Court that there was one further deposition that we had intended to take in this matter, of McColl, down in Florida. And we didn't feel that all the evidence would be in in terms of depositions taken to date. So, the matter had to be prepared in terms of being ready for trial for the motion as a summary judgment, Your Honor.

Now, I don't know if that would make any difference in Your Honor's summary proceedings today; but if it would, we would certainly like to have the opportunity to take that deposition.

THE COURT: Counsel, I can't tell you whether it would or wouldn't, when I don't know whether it would.

I might go this far, I will let you have sixty days to present any discovery which you might wish to present to the Court, and hold the signing of the order in (51) abeyance — or at least require that the order provide that they have sixty days in which to present it.

MR. GERGELY: Thank you, Judge.

MR. POTTER: On this point, Your Honor, I might point out that this case has been in process of preparation now for a very long time. The depositions which are before Your Honor at the moment, were taken nearly a year ago. There has been ample opportunity for the plaintiff to take such depositions as he wishes. They have not done so.

The United States, as far as it is concerned, feels that the matters before the Court are adequate on which to decide the question presented.

Mr. McColl, the employee of Cobb Dredging Company, is not going to elucidate the matter further.

THE COURT: Apparently counsel doesn't know whether he can or not, as a matter of fact. But I am willing to give them that additional time, Counsel. If I err, I would rather err on that side and make it certain that I have it all before me.

MR. POTTER: All right.

MR. GERGELY: Thank you, Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (No. 73-1433)

Before Weick, Celebrezze, and McCree, Circuit Judges.

Upon consideration of the Brief and Argument of Counsel, we are of the opinion that the District Court did not err in granting the Motion of the Government for Summary Judgment. It clearly appeared from the undisputed evidence that the work of dredging, for which the government awarded a contract to an independent contractor, was not inherently dangerous.

The Government, under the Tort Claims Act, is not liable for the negligence of employees of an independent contractor. *Gowdy* v. *United States,* 412 F.2d 525, *cert. denied,* 396 U.S. 960 (1969), *re-hearing denied,* 396 U.S. 1063 (1970).

It is, therefore, ORDERED that the Judgment of the District Court be and is hereby affirmed.

ENTERED BY ORDER OF THE COURT.

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Circuit Court Clerk

APPENDIX C

Here are set forth, successively, Appellants' Complaint and Appellees' Answer.

COMPLAINT

NOW COME the plaintiffs by their attorneys, Bucknell, Gergely and Foley and James Thomas Sloan, Jr., and for cause of action against the defendants say:

COUNT I

1. That all times hereinafter mentioned the defendant, Cobb Dredging Company, was and still is a corporation doing business in the State of Michigan.

2. Upon information and belief, that at all times hereinafter mentioned the defendant, Cobb Dredging Company, owned and/or maintained, operated and controlled a certain Dredge which was used in the business of commerce and navigation on the Great Lakes and their connecting tributaries.

3. That on the 22nd day of April, 1968, the plaintiff, Terrance L. Pride, was in the employ of the defendant, Cobb Dredging Company, in the capacity of a seaman and employee upon defendant's Dredge.

4. That the plaintiff, Terrance L. Pride, is a seaman and employee and at all times hereinafter mentioned there was still in force and effect an Act of Congress known as the Merchant Marine Act (Title 46, U.S.C.A., Chapter 18, Section 688) approved June 5, 1920, Section 33.

5. Plaintiff, Terrance L. Pride, says that on or about the 22nd day of April, 1968, at the approximate hour of 10:00 a.m., said vessel was engaged in dredging operations upon the waters of the Great Lakes and its connecting tributaries, Bolles Harbor, Michigan. That at the aforesaid time and place the defendant, Cobb Dredging Company, its agents, servants and employees, were in the process of pumping air into a fuel oil tank which was used in connec-

tion with the said defendant's dredging operations. That said fuel oil tank exploded and, as a result thereof, plaintiff, Terrance L. Pride, sustained severe and painful injuries as hereinafter more particularly set forth.

6. That the defendant, Cobb Dredging Company, has neglected, failed and refused to pay any monies to the plaintiff, Terrance L. Pride, as the result of his aforementioned injuries.

7. That his injuries hereinafter stated were not caused by any negligence, fault or want of care on this plaintiff's part, but wholly and solely by reason of the negligence of the defendant, Cobb Dredging Company, its servants, agents and employees, acting within the scope of their employment:

a. In negligently failing to furnish plaintiff with an adequate number of officers and co-employees, and to provide the plaintiff with skillful, careful and competent co-employees, master and other officers.

b. In failing to furnish plaintiff with a safe place in which to do his work.

c. In failing to warn plaintiff of the dangers to be encountered in the performance of his work on said vessel.

d. In failing to promulgate and enforce proper safety rules and regulations on said vessel in relation to the foregoing and to inspect the aforesaid materials, appliances and means.

e. In failing to warn or apprise the plaintiff, when the defendant knew or in the exercise of ordinary care should have known of the dangers existing therein and the dangers incident thereto.

8. That as a direct and proximate result of the said defendant's negligence in one or more of the aforesaid matters, plaintiff, Terrance L. Pride, then and there sustained the total loss of the right eye, fractured skull, severe cranial lacerations, fractured bones in the face and head and

an injury to the left eye. That plaintiff, Terrance L. Pride, became and was disabled and suffered and will suffer great pain, discomfort, physical impairment and disfigurement. That plaintiff's injuries are permanent. That plaintiff, Terrance L. Pride, says that he has lost and will lose great gains which he otherwise would have made and acquired and that he will suffer a loss of earnings in the future. Plaintiff, Terrance L. Pride, has been required to incur hospital and medical expenses and will be required to incur hospital and medical expenses in connection with his injuries.

WHEREFORE, Plaintiff, Terrance L. Pride, claims judgment in the sum of ONE MILLION ($1,000,000.00) DOLLARS, plus court costs and attorney fees and interest from date of filing of complaint.

COUNT II

1. Plaintiff, Terrance L. Pride, repeats and realleges all the facts set forth in the 1st, 2nd, 3rd, 5th and 8th paragraphs of the first count, with the same force and effect as though pleaded herein in full, omitting all allegations of negligence.

2. Plaintiff, Terrance L. Pride, elects to maintain this cause of action under the General Admiralty and Maritime Law, and further, takes the benefit of all Statutes of the United States, modifying or extending the common law, right or remedy in cases of personal injury.

3. That the defendant failed to furnish the plaintiff with a seaworthy vessel at the aforementioned time and place.

WHEREFORE, plaintiff, Terrance L. Pride, claims judgment in the sum of ONE MILLION ($1,000,000.00) DOLLARS, plus court costs and attorney fees and interest from date of filing of complaint.

COUNT III

1. Plaintiff, Terrance L. Pride, repeats and realleges all the facts set forth in Count I with the same force and effect

as though pleaded herein in full, omitting all allegations of negligence, unseaworthiness, pain and suffering, loss of wages, diminution of earning capacity and any and all claims other than amounts needed to maintain and cure himself in and about his care while disabled and unable to work including both past maintenance and cure and maintenance and cure for a reasonable period in the future.

2. That it was the duty of the defendant to provide the plaintiff with the expenses of his maintenance and cure.

3. That the plaintiff as a result of the foregoing has expended and will expend for a reasonable period of time in the future for his maintenance and cure while disabled and unable to work the sum of One Million ($1,000,000.00) dollars.

WHEREFORE, plaintiff, Terrance L. Pride, demands judgment against the defendant in the sum of ONE MILLION ($1,000,000.00) DOLLARS, together with costs and disbursements of this action and further prays that he be permitted to prosecute this action without advancement of or give security for costs, under favor of the Statutes of the United States in such cases made and provide, particularly Chapter 113, 40 Statutes, 688 U.S. Code, Title 28, Section 1916.

COUNT IV

1. That plaintiffs, Terrance L. Pride and Nadine J. Pride, are husband and wife. That the amount in controversy exceeds Ten thousand ($10,000.00) dollars.

2. That on or about April 22, 1968, Cobb Dredging Company was engaged in a dredging operation at LaPlaisance Creek, Bolles Harbor, Michigan.

3. That while so doing, said Cobb Dredging Company caused a 285-gallon fuel oil tank to be pressurized with air in an excessive amount and created an unusual danger and an inherently dangerous activity by the reason of overpressurization of said fuel oil tank in excess of 80 pounds of pressure. That by reason thereof, the said fuel oil tank exploded upon plaintiff, Terrance L. Pride, who was then

and there working in the vicinity of the same in a safe and prudent manner.

4. That defendant, United States of America, through the Department of the Army, Detroit District Corps of Engineers, was in complete control of the aforesaid dredging operation and/or assumed the duty of preventing Cobb Dredging Company from carrying on the inherently dangerous activity described herein.

5. That defendant, United States of America, Department of the Army, Detroit District Corps of Engineers, had the duty and/or assumed the duty of inspecting and preventing an inherently dangerous activity as described herein from continuing to the damage of the plaintiff, Terrance L. Pride, and carelessly and negligently actively failed to prevent the continuance of such inherently dangerous activity known and ought to have been known by said defendant, who therefore actively failed to furnish the plaintiff with a safe place to work.

6. That as a direct and proximate result of said inherently dangerous activity described above, plaintiff, Terrance L. Pride, has suffered and continues to suffer painful and lasting injuries consisting of the total loss of the right eye, fractured skull, severe cranial lacerations, fractured bones in the face and head, and serious injuries to the left eye. That plaintiff's injuries are permanent. That plaintiff is disabled and will continue to be disabled. That his earning capacity is impaired and will continue to be impaired. That he has suffered pain, agony, disability and disfigurement and will suffer future pain, agony, disability and disfigurement. That he has incurred hospital and medical expenses and will be forced to incur future hospital and medical expenses. That plaintiff has been damaged in the sum of Nine hundred thousand ($900,000.00) dollars.

7. That plaintiff, Nadine J. Pride, the wife of Terrance L. Pride, has sustained damage in the nature of the loss of consortium, services and society of her husband. That said damages will continue in the future. That plaintiff has been damaged in the sum of One hundred thousand ($100,000.00) dollars.

WHEREFORE, plaintiff, Terrance L. Pride, claims judgment against the defendant in the sum of NINE HUNDRED THOUSAND ($900,000.00) DOLLARS, together with interest from the date of filing this complaint. That plaintiff, Nadine J. Pride, claims damages against the defendant in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, together with interest from the date of filing this complaint.

Dated: September 23, 1969.

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ANSWER AND CROSS-CLAIM OF DEFENDANT UNITED STATES OF AMERICA
(Filed February 9, 1970)

ANSWER

FIRST DEFENSE

Defendant United States of America for answer to the complaint of Terrance L. Pride and Nadine J. Pride, admits, denies and alleges upon information and belief as follows:

COUNT I

1. Denied for lack of knowledge or information.
2. Denied for lack of knowledge or information.

3. Denied, except admitted that plaintiff Terrance L. Pride was employed by defendant Cobb Dredging Company on April 22, 1968.

4. Denied.

5. Denied.

6. Denied for lack of knowledge or information.

7. Denied, except admitted and alleged that if plaintiffs Terrance L. Pride and Nadine J. Pride sustained injuries or damages by reason of the matters alleged in the complaint, which is denied, such injuries or damages were caused wholly and solely by reason of the negligence, fault or breach of undertaking and contract of defendant Cobb Dredging Company, its officers, servants, agents and employees.

8. Denied.

COUNT II

1. Denied, except as hereinabove expressly admitted.

2. Denied.

3. Denied.

COUNT III

1. Denied, except as hereinabove expressly admitted.

2. Denied.

3. Denied.

COUNT IV

1. Denied for lack of knowledge or information.

2. Denied for lack of knowledge or information.

3. Denied.

4. Denied.

5. Denied.

6. Denied.

7. Denied.

SECOND DEFENSE

If plaintiff was injured at the time and under the circumstances as alleged in the complaint, which defendant denies, such injuries were caused in whole or in part by his own negligence and not by the negligence of defendant United States of America, its agents, servants, employees or those for whom they were responsible.

THIRD DEFENSE

If plaintiffs sustained injuries or damages by reason of the matters alleged in their complaint, which is denied, such injuries or damages were not caused or contributed to by any fault, negligence or breach of undertaking on the part of defendant United States, its officers, agents, servants or employees, but arose or resulted, if at all, from the sole fault, negligence or breach of undertaking and contract on the part of Cobb Dredging Company, its officers, agents, servants or employees.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of the action by plaintiff Nadine J. Pride against the United States of America, in that she has not prior to commencing this action or otherwise presented an administrative claim to the appropriate or any agency of the Government of the United States as required by law.

FIFTH DEFENSE

Plaintiff Terrance L. Pride, in entering into the alleged employment, assumed the risks incident thereto, and whatever injuries or damages were received in the course of his employment and are complained of in his complaint arose from and were caused by said risks assumed by plaintiff.

SIXTH DEFENSE

The complaint fails to state a claim against defendant United States of America upon which relief can be granted.

CROSS-CLAIM

The cross-claim of the United States of America against defendant Cobb Dredging Company, filed herein pursuant to Rule 13(g) of the Federal Rules of Civil Procedure, alleges on information and belief as follows:

1. Plaintiffs Terrance L. Pride and Nadine J. Pride have filed against the United States of America and against Cobb Dredging Company a complaint, a copy of which is attached hereto as "Exhibit A". The answer of defendant United States to the said complaint is a part of this pleading.

2. This cross-claim sets forth a contract cause of admiralty and maritime jurisdiction, as hereinafter more fully appears, and within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

3. Cross-claimant United States is and was at all material times a sovereign nation which brings this action pursuant to the original jurisdiction conferred on this Court by 28 U.S.C. 1345.

4. Defendant Cobb Dredging Company is now and at all material times was a concern doing business in the State of Michigan with places of business at 410 National Bank Building, Jackson, Michigan and 101 Lynwood Drive, Battle Creek, Michigan, and subject to suit in its name as Cobb Dredging Company.

5. At all times material herein, defendant Cobb Dredging Company held itself out to the public and to cross-claimant United States as a skillful, expert and professional dredging and construction contractor.

6. On November 29, 1966, cross-claimant United States contracted with defendant Cobb Dredging Company to perform certain dredging and construction work in and along

the shores of LaPlaisance Creek and Lake Erie at Bolles Harbor, Michigan, in a proper, skillful, careful and workmanlike manner.

7. At all times mentioned in the complaint herein, the place where plaintiff Terrance L. Pride was working when he sustained his alleged injuries, together with all material, gear, equipment or appurtenances being used in, or otherwise necessary and incidental to the work of dredging and construction, were all under the immediate custody, control, direction and supervision of defendant Cobb Dredging Company for the use of its officers, agents, servants, and employees in performing its obligations under the contract as aforesaid.

8. At all times mentioned in the complaint herein, any and all machinery, gear, material, equipment or appurtenances said to have been responsible for the injuries to plaintiff Terrance L. Pride, as well as the areas and spaces in the vicinity of the same, were all operated, maintained, and controlled by and were under the immediate and exclusive custody, control, direction and supervision of defendant Cobb Dredging Company, its officers, agents, servants and employees.

9. By reason of its contractual obligations to provide expert dredging and construction services to cross-claimant United States, Defendant Cobb Dredging Company was, at all times material herein, obligated to perform said services in such a manner as not to visit liability to any person upon its customer, cross-claimant United States; to exercise due and proper care in the performance of the services called for by said contract; to perform its dredging and construction services in an expert, professional, skillful, and workmanlike manner; to insure that all material, gear, equipment and personnel furnished or used by it to perform said services were fit and proper for the purpose for which they were to serve; to make all necessary efforts to prevent accidents or injuries to all persons in or near the work areas, material, gear and equipment in its custody and control during the performance of said work; to warn all persons and prevent them from exposure to dangerous con-

ditions which might arise during the course of said work; to discover, prevent and properly correct any and all dangerous conditions in or near the work areas, gear, equipment and material in its custody and control which might arise during the course of said work; and to stop all work until such dangerous conditions were corrected.

10. Defendant Cobb Dredging Company failed and neglected to perform in a proper, skillful, workmanlike and professional manner the duties which it undertook as aforesaid.

11. If Plaintiffs sustained injuries or damages by reason of the matters alleged in their complaint, which is denied, such injuries or damages were not caused or contributed to by any fault, negligence or breach of undertaking and contract on the part of cross-claimant United States, its officers, agents, servants or employees, but resulted solely from the breach of undertaking and contract by defendant Cobb Dredging Company through the substandard, faulty, improper, unworkmanlike and unprofessional performance rendered by Cobb Dredging Company, its officers, agents, servants and employees in the conduct of the work called for by said dredging and construction contract.

12. If the plaintiffs sustained injuries or damages by reason of the matters alleged in their complaint, which is denied, such injuries or damages arose or grew out of the fault, negligence, unworkmanlike and unprofessional performance of defendant Cobb Dredging Company in breach of its contractual obligations and of its warranties; therefore, defendant Cobb Dredging Company is liable to cross-claimant for the damages resulting from such breach, and in particular, is liable to reimburse cross-claimant for all investigative expenses, attorneys' fees, costs and other expenses and disbursements incurred by cross-claimant in defending the plaintiffs' action herein both in this Court and on any appeal and certiorari proceedings, and if cross-claimant is held liable to plaintiffs Terrance L. Pride and Nadine J. Pride by reason of the matters alleged in the complaint, to reimburse cross-claimant for the full amount

of any judgment in addition to the investigative expenses, attorneys' fees, costs and other expenses and disbursements as aforesaid.

WHEREFORE, cross-claimant and defendant United States of America prays that:

1. Judgment be entered dismissing plaintiffs' action against defendant United States;

2. Judgment be entered against defendant Cobb Dredging Company for all attorneys' fees, costs, expenses and disbursements incurred by the United States in defense of the complaint herein;

3. If any judgment be entered against the United States in favor of plaintiffs, then that a judgment over be entered in favor of the United States against Cobb Dredging Company requiring Cobb Dredging Company to pay to the United States the amount of any such judgment against the United States and to indemnify and exonerate the United States against all liability herein; and

4. The Court grant to the United States such other and further relief as is just and proper in the premises.

James H. Brickley
United States Attorney

By: .....
Assistant United States Attorney

(s) William E. Gwatkin, III
Attorney, Admiralty & Shipping
Section, Department of Justice
Washington, D. C.
Attorneys for Defendant and
Cross-Claimant United States
of America